UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MELANIE R.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C22-5533-BAT

ORDER AFFIRMING THE COMMISSIONER'S DECISION

Plaintiff appeals the ALJ's decision finding her not disabled. She contends the ALJ misevaluated certain medical opinions, her testimony and her husband's testimony. Dkt. 13 at 1. For the reasons below, the Court **AFFIRMS** the Commissioner's final decision and **DISMISSES** the case with prejudice.

BACKGROUND

Plaintiff is currently 54 years old, has a high school diploma and some community college education, and has worked as a certified nursing assistant, office worker, and property manager. Tr. 89, 208, 500. In March 2018, she applied for benefits, and subsequently amended her alleged onset date to October 22, 2016. Tr. 187-93, 1417. Her application was denied initially and on reconsideration. Tr. 124-26, 128-30. The ALJ conducted a hearing in May 2019 (Tr. 60-99), and subsequently found Plaintiff not disabled. Tr. 41-55.

The Appeals Council denied Plaintiff's request for review (Tr. 1-7), and Plaintiff sought judicial review. The U.S. District Court for the Western District of Washington reversed the ALJ's decision and remanded for further administrative proceedings. Tr. 1483-89. On remand, the ALJ held a hearing (Tr. 1439-77), and subsequently issued a decision finding Plaintiff not disabled. Tr. 1417-32. As the Appeals Council did not assume jurisdiction, the ALJ's decision is the Commissioner's final decision.

DISCUSSION

A. Medical Opinions

Plaintiff contends the ALJ misevaluated the opinion of Steven Nadler, M.D., and the opinions of State agency medical consultants. The ALJ was required to articulate the persuasiveness of each medical opinion, specifically with respect to whether the opinions are supported and consistent with the record. 20 C.F.R. § 404.1520c(a)-(c). An ALJ's consistency and supportability findings must be supported by substantial evidence. *See Woods v. Kijakazi*, 32 F.4th 785, 792 (9th Cir. 2022).

1. Steven Nadler, M.D.

In May 2016, Dr. Nadler examined Plaintiff in connection with a worker's compensation claim and prepared a narrative report, and an April 2017 addendum, describing Plaintiff's symptoms and limitations. Tr. 288-89, 332-44. Dr. Nadler opined Plaintiff's allegations were inconsistent with the objective findings, and found Plaintiff could return to her past job (if her back surgery was not administratively accepted as related to her workplace injury) or was limited to "sedentary" work limited to lifting no more than 15-20 pounds and no repeated bending (if her back surgery was administratively accepted as related to her workplace injury). Tr. 342-44. Dr. Nadler also opined Plaintiff's back and shoulder condition had been only "temporarily"

aggravated by her workplace injury and had since resolved. *See* Tr. 343. Finally, Dr. Nadler indicated no workplace restrictions were caused by Plaintiff's shoulder condition. *Id*.

The ALJ accepted Dr. Nadler's indication Plaintiff's complaints were inconsistent with the objective findings because the evidence showed Plaintiff's condition improved with physical therapy. Tr. 1427. However,the ALJ rejected other portions of Dr. Nadler's opinion as internally inconsistent, including whether Plaintiff could return to her past work or was more limited, which appeared contingent on administrative acceptance of Plaintiff's back surgery. Tr. 1427-28. The ALJ also noted although Dr. Nadler used the term "sedentary" work, his use of this term was inconsistent with that term as used in Social Security disability evaluations because "light" jobs with a sit/stand option can also be performed by people who cannot stand or walk more than two hours and can lift no more than 20 pounds. Tr. 1428. The ALJ also discounted Dr. Nadler's opinion Plaintiff was limited to two hours of standing and walking, as inconsistent with Dr. Nadler's statement Plaintiff's shoulder and back conditions had resolved, her complaints were inconsistent with the objective findings, and Plaintiff could return to her past job. *Id*. The ALJ further found this portion of Dr. Nadler's opinion was inconsistent with Plaintiff's activities — specifically hunting with a crossbow, fishing, and driving a motorhome from Washington to California and Alaska — as well as her reports of improvement with physical therapy. *Id*.

Plaintiff first argues the ALJ misevaluated the doctor's opinions by incorrectly suggesting the specific limitations Dr. Nadler identified are consistent with a light RFC because Dr. Nadler limited Plaintiff to sedentary work. Dkt. 13 at 12. The argument fails because in this decision, the ALJ did not find the RFC assessment was consistent with Dr. Nadler's opinion; the prior ALJ decision included that finding. *See* Tr. 51.

Next, Plaintiff argues the ALJ erroneously deemed Dr. Nadler's use of the term "sedentary" work was technically inaccurate for purposes of a social security disability claim as Washington's worker's compensation program uses similar terminology. Dkt. 13 at 12. The Court rejects the argument because the ALJ found based upon the limitations the doctor assessed and the vocational experts testimony that there were jobs Plaintiff could perform, regardless of the work level label the doctor used.

Next, Plaintiff contends the ALJ erroneously relied on vocational expert ("VE") testimony to determine Plaintiff's RFC, arguing the ALJ must determine the RFC exertional category *before* consulting the VE. Dkt. 13 at 12. Plaintiff cites no authority in support of this argument. However, the Court notes Plaintiff is correct that the sequential evaluation process the ALJ must apply normally requires the ALJ to make a RFC before proceeding to step four. The ALJ's decision itself states "before considering step four of the sequential evaluation process, I must first determine the claimant's residual funcation capacity." Tr. 1419.

Assuming without deciding the ALJ should have made the RFC determination in this case before the VE testified, and thus erred, the Court finds Plaintiff has not shown harm. Agency guidance specifically permits ALJs to engage in a colloquy with VEs, posing multiple hypotheticals as part of the decision-making process, as the ALJ did here (Tr. 1464-73). *See, e.g.*, Hearings, Appeals and Litigation Law Manual I-2-6-74(C)-(D), *available at* https://www.ssa.gov/OP_Home/hallex/I-02/I-2-6-74.html (last visited Jan. 24, 2023). There is no evidence the ALJ was motivated by the impermissible results-based reverse-engineering suggested by Plaintiff. *See* Dkt. 15 at 4, 7 (accusing the ALJ of "fishing for occupations and job numbers" from the VE).

Additionally, although Plaintiff notes the ALJ was required to determine whether the

Medical-Vocational Guidelines ("the Grids") would direct a finding of disability before obtaining VE testimony, the ALJ's decision complies with this requirement. *See* Tr. 1431 (before entering alternative step-five findings, in reliance on VE testimony, the ALJ applied the Grids to find that if Plaintiff could perform the full range of light work, she would be found not disabled, and that her ability to perform the full range of light work was also impeded by additional limitations). Plaintiff cites no authority the ALJ must perform this step before eliciting VE testimony at the hearing.

Next, Plaintiff challenges the ALJ's finding Dr. Nadler's opinion was inconsistent with the record, citing evidence she argues is consistent with the doctor's conclusions. Dkt. 13 at 13-14. This argument askes the Court to reweigh the evidence, which is something the Court cannot do. Instead, the Court must focus on the ALJ's assessment of Dr. Nadler's opinion, and the record rather than assessing the record to determine whether other evidence could have been found inconsistent with the opinion. *See Jamerson v. Chater*, 112 F.3d 1064, 1067 (9th Cir. 1997) ("[T]he key question is not whether there is substantial evidence that could support a finding of disability, but whether there is substantial evidence to support the Commissioner's actual finding that claimant is not disabled."). Here, the ALJ found Dr. Nadler's opinion Plaintiff was limited to two hours of standing/walking unpersuasive because it was inconsistent with Plaintiff's activities as well as the evidence of her improvement with physical therapy. Tr. 1428. Even if, as Plaintiff argues (Dkt. 15 at 4-6), the ALJ erred in finding Plaintiff's activities were inconsistent with a limitation to two hours of standing/walking per day, Plaintiff has presented no argument the ALJ erred in finding that such a limitation was inconsistent with Plaintiff's improvement with physical therapy, and thus failed to meet her burden to show harmful error in this aspect of the ALJ's decision.

The Court also cannot say that the ALJ's assessment of the record is unreasonable and that substantial evidence thus does not support the ALJ's determination to discount the doctor's opinion as inconsistent with the record.

Lastly, Plaintiff argues the ALJ erred in finding Dr. Nadler's restriction to sedentary work was inconsistent with his own examination findings, but there is no such reasoning in the ALJ's decision. Again, Plaintiff references the prior ALJ decision rather than the decision currently on appeal. *See* Dkt. 13 at 14 (citing Tr. 51). In this case, the ALJ found Dr. Nadler's examination findings show Plaintiff's complaints are inconsistent with the objective findings of record; the ALJ also referenced the internal inconsistency between Dr. Nadler's finding Plaintiff could return to her prior work or in the alternative perform only sedentary work. Tr. 1427-28. But because the ALJ did not contrast a restriction to sedentary work with Dr. Nadler's examination findings, this portion of Plaintiff's brief does not pertain to the ALJ decision currently on appeal.

In sum, Plaintiff has failed to establish the ALJ harmfully erred in evaluating Dr. Nadler's opinion.

2. State Agency Medical Consultants

The State agency medical consultants opined Plaintiff was limited to *inter alia* four hours of standing/walking per day, and could handle on an occasional basis. Tr. 106-10, 118-22. The State agency consultants also described Plaintiff as limited to both less than a full range of light work, or sedentary work. *Id*. The ALJ found most of the State agency opinions persuasive, except the ALJ explicitly found the handling limitation was unpersuasive because "there is no impairment that supports this limitation" and such a limitation was inconsistent with the record, specifically Dr. Nadler's opinion that Plaintiff had no limitations related to her shoulder

condition. Tr. 1426. The ALJ further indicated although the State agency consultants referred to Plaintiff as limited to sedentary work, the VE testified that even if Plaintiff was limited to two hours of standing and walking (which would be more restricted than the consultants found Plaintiff to be), Plaintiff could nonetheless perform some light jobs if a sit/stand option was available. Tr. 1426. The ALJ found the VE's testimony to be more reliable as to the exertional category describing Plaintiff's RFC than the State agency consultants' opinion. *Id*.

Plaintiff challenges the ALJ's assessment of the State agency opinions, raising some of the same arguments made as to Dr. Nadler's opinion. First, Plaintiff argues the ALJ failed to provide legally sufficient reasons to find the handling limitation identified by the State agency consultants (Dkt. 13 at 6), but does not provide any further explanation as to why the ALJ's reasoning was insufficient. The ALJ found the handling limitation to be inconsistent with the evidence of Plaintiff's improvement after surgery and inconsistent with Dr. Nadler's opinion that Plaintiff's shoulder condition did not result in any handling limitations. *See* Tr. 1426. Plaintiff emphasizes she alleged pain in her wrist, and assumes the State agency consultants credited that allegation (Dkt. 13 at 8), but the ALJ did not find any wrist-related impairment at step two and Plaintiff does not assign error to that finding. *See* Tr. 1420. Plaintiff has thus not shown the ALJ erred in noting "there is no impairment that supports" the handling limitation, and accordingly the ALJ's RFC assessment accounts for the credible limitations related to her medically determinable impairments. *See* 20 C.F.R. § 404.1545(a)(2). Plaintiff has not shown the ALJ's reasoning was unreasonable or not supported by substantial evidence, and thus has failed to show any error in the ALJ's consistency finding.

Next, Plaintiff argues the ALJ erred in citing VE testimony as more persuasive than the State agency opinions as to the correct exertional label for Plaintiff's RFC. Dkt. 13 at 7. But the

ALJ was not required to use an exertional label in describing Plaintiff's RFC. *See, e.g.*, SSR 96-8p, 1996 WL 374184, at *1 (Jul. 2, 1996) (explaining that an ALJ's "RFC assessment must first identify the [claimant's] functional limitations or restrictions and assess his or her work-related abilities on a function-by-function basis," specifically the physical, mental, and other abilities affected by a claimant's impairments). The ALJ's RFC assessment is consistent with the functional limitations identified by the State agency consultants, and the ALJ merely rejected the categorical label. Plaintiff has not shown the ALJ's rejection of one of the categorical labels used by the State agency consultants resulted in prejudicial harm, given the ALJ was not required to refer to a categorical label at all.

Moreover, the State agency opinions described exertional limitations that place Plaintiff between the categories of sedentary and light, and the ALJ's adoption of those limitations properly led the ALJ to obtain VE testimony at the hearing. *See* SSR 83-12, 1983 WL 31253 (Jan. 1, 1983) (where an individual's RFC falls between two exertional categories with contrary disability conclusions under the Grids, an ALJ appropriately consults a VE at hearing); *Moore v. Apfel*, 216 F.3d 864, 867, 870-71 (9th Cir. 2000) (finding ALJ properly relied on VE's testimony where a claimant's exertional limitations placed him between sedentary and light, and where he also had non-exertional limitations). Plaintiff has not shown the ALJ erred in determining her RFC, or in obtaining and relying upon VE testimony to find Plaintiff not disabled.

B. Plaintiff's Testimony

The ALJ discounted Plaintiff's testimony because: (1) Plaintiff's activities were inconsistent with her alleged symptoms and limitations, (2) the objective evidence fails to corroborate Plaintiff's testimony, (3) Plaintiff's treatment was conservative, and (4) Plaintiff's conditions improved with treatment. Tr. 1421-25. In the absence of evidence of malingering, an

ALJ is required to provide clear and convincing reasons to discount a claimant's testimony. *See Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).

Plaintiff contends the ALJ erred in relying on activities that are not actually inconsistent with her allegations. Dkt. 13 at 9-11, 17. As explained in a prior court remand order (Tr. 1487-88), the Court finds some merit in this contention, but finds any error in the ALJ's reliance on Plaintiff's activities is harmless in light of the other reasons provided by the ALJ. The ALJ did not err in discounting Plaintiff's allegations based on her course of conservative treatment as well as her improvement with treatment, despite her hearing testimony to the contrary. *See* Tr. 1424-25; *Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) (stating that "evidence of 'conservative treatment' is sufficient to discount a claimant's testimony regarding severity of an impairment"); *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599-600 (9th Cir. 1999) (contrary to plaintiff's claims of lack of improvement, physician reported symptoms improved with use of medication).

Plaintiff also contends the ALJ erred in failing to acknowledge Plaintiff's claim of sleep disruption and the fatigue she experiences as a medication side effect. Dkt. 13 at 17. But the ALJ did acknowledge Plaintiff's sleep problems (Tr. 1421), and Plaintiff has not pointed to any evidence showing Plaintiff's fatigue caused limitations beyond those summarized by the ALJ. *See* Dkt. 13 at 17 (citing Tr. 252 (Plaintiff's report to the agency that certain pain medications make her sleepy)). Plaintiff has not shown the ALJ failed to appreciate the extent of her allegations, and thus has not shown error in this part of the ALJ's assessment of her testimony.

C. Plaintiff's Husband's Statement

Plaintiff's husband completed two written statements describing Plaintiff's limitations, and concluding Plaintiff "will never be able to have a viable job again." *See* Tr. 217-24, 278.

The ALJ summarized Plaintiff's husband's statements and found the limitations he described were inconsistent with the objective medical evidence as well as inconsistent with the activities he and Plaintiff described. Tr. 1429. The ALJ also found Plaintiff's husband's statement Plaintiff could not work again touches on an issue reserved to the Commissioner. *Id*. An ALJ must explain why significant, probative evidence is rejected, *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984), and Plaintiff contends the ALJ's reasons for rejecting her husband's statements are legally insufficient.

Plaintiff contends the ALJ erred in finding her husband's statements to be inconsistent with the medical evidence because they are in fact consistent with certain objective findings referenced in Dr. Nadler's opinion. Dkt. 13 at 15. While both Dr. Nadler and Plaintiff's husband indicated Plaintiff has limitations, they did not reach consistent conclusions as to the impact of her limitations. Dr. Nadler opined Plaintiff's limitations would not prevent her from returning to her past job and/or performing a different job with limited lifting and no repeated bending, whereas Plaintiff's husband stated Plaintiff's limitations were so severe as to preclude all work. The Court thus cannot say it was unreasonable for the ALJ to find the medical evidence is inconsistent with the degree of limitations described by her husband, or in discounting her husband's statement on this basis.

Furthermore, any error in the ALJ's assessment of Plaintiff's husband's statements would be harmless because Plaintiff's husband's statements are similar to Plaintiff's, and the ALJ properly discounted Plaintiff's statements. *See Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009) (because "the ALJ provided clear and convincing reasons for rejecting [the claimant's] own subjective complaints, and because [the lay witness's] testimony was similar to such complaints, it follows that the ALJ also gave germane reasons for rejecting

[the lay witness's] testimony").

CONCLUSION

For the foregoing reasons, the Commissioner's decision is **AFFIRMED** and this case is **DISMISSED** with prejudice.

DATED this 26th day of January, 2023.

BRIAN A. TSUCHIDA
United States Magistrate Judge